RECENT DEVELOPMENTS IN EMPLOYMENT LAW AND LITIGATION

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Labor and employment law continues to develop at a rapid pace, making it difficult for employers to keep up with the ever-changing landscape. There is continued conflict in the federal circuit courts and/or federal agencies in numerous areas of the law, including enforceability of class action waivers in employment arbitration agreements, protections for speech and other workplace conduct, and protection of sexual orientation under Title VII of the Civil Rights Act of 1964, among other issues.

Throughout much of 2016 and 2017, the National Labor Relations Board (NLRB, or Board) continued its generally pro-labor-leaning decisions, applying an expansive definition of employees' Section 7 rights. However, with the change in the administration and the appointment of Republican, pro-employer members to the Board, it is expected that there will be a change in the NLRB's approach toward an interpretation of employee rights under the National Labor Relations Act (NLRA),[1] and a balance of those rights against employers' legitimate business interests.

1. 29 U.S.C. §§ 151–169.

I. SURVEY OF 2016–2017 FEDERAL AND STATE CASES ADDRESSING THE QUESTION OF ENFORCEABILITY OF CLASS ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS

Commencing suit in class or collective form against an employer has its appeal. Employees may achieve more favorable results, pursue smaller claims against larger employers, and aggregate multiple claims. For employers, on the other hand, employment-related class action suits risk adversely impacting business, present issues of costs and expenditures of corporate resources, and create exposure to challenges in multiple jurisdictions, particularly for those employers that operate across state lines.

The popularity of class action suits in the employment arena in recent years has undoubtedly increased. In 2016, for example, the federal and state courts certified more class actions than in prior years.[2] Among those cases certified were filings alleging employment discrimination, violations of wage and hour obligations, and transgressions of the Employee Retirement Income Security Act.[3] Moreover, of the 8,308 lawsuits filed in 2016 in federal court asserting violations of the Fair Labor Standards Act, "virtually all" were filed as collective actions.[4]

In an effort to curb the proliferation of class actions, there has been a trend among employers in the past decade to include provisions in employment agreements requiring that all employment-related disputes be resolved through arbitration on an individual basis. In other words, class-wide arbitration must be waived. However, as early as 2012, the NLRB has taken the position that waivers of class or collective action in arbitration agreements in the employment context are unenforceable as violative of the NLRA, among others.

On October 2, 2017, the U.S. Supreme Court heard oral argument in *National Labor Relations Board v. Murphy Oil USA, Inc.*,[5] *Epic Systems Corp. v. Lewis*,[6] and *Ernst & Young LLP v. Morris*,[7] three cases posing the precise question of whether arbitration agreements that prohibit employees from engaging in class or collective action to resolve employment-related claims are enforceable.

The Supreme Court's resolution of the issue is highly anticipated in view of the current split among the U.S. Courts of Appeal on the issue. In these cases, the courts have addressed the question of the manner in

2. Seyfarth Shaw, 13th Annual Workplace Class Action Litigation Report (2017).
3. *See id.* at 2.
4. *Id.* at 19.
5. 137 S. Ct. 809 (2017).
6. *Id.*
7. *Id.*

which a litigant's right to proceed on a classwide basis should be balanced against a legal system that favors arbitration as an alternative method of resolving disputes. Moreover, whether such provisions are enforceable has raised the question of how to balance the right to contract freely, inclusive of waiver, with those same employee rights.

The sections below survey the federal and state cases from October 2016 through September 2017 addressing the validity of class action waivers in arbitration agreements, whether as conditions to employment or in relation to some other employer-employee-like relationship. Federal and state courts continue to struggle with the issue in light of the current conflict among the circuit courts. The Sixth Circuit, for example, addressed the issue for the first time in May 2017, despite the existing split between the circuits and the uncertainty of the longevity and validity of its determination. In at least one state, the state's intermediate appellate court took the opposite approach of that state's federal circuit court, placing the federal and state courts at odds with another on the pertinent question.

Whether agreements that mandate that all claims be arbitrated and bar employees from engaging in class or collective action in the pursuit of such claims are violative of the NLRA ultimately remains to be determined. However, the cases below shed some light in the manner in which the courts are addressing the issue. Until the Supreme Court issues its determination, employers should be aware of the interests at play and the risks of using such waivers.

A. *The NLRA, the FAA, and* D.R. Horton, Inc. v. NLRB

Section 7 of the NLRA establishes the rights of employees.[8] This section provides that employees may self-organize and "engage in other concerted activities."[9] Specifically, Section 7 provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.[10]

Section 7 does not define the phrase "concerted activities."

Section 8 of the NLRA enforces the rights enumerated in Section 7 by making it "an unfair labor practice for an employer . . . to interfere with,

8. *See* 29 U.S.C. § 157 (1935).
9. 29 U.S.C. § 157.
10. *Id.*

restrain, or coerce employees in the exercise of the rights guaranteed" in that section.[11]

The Federal Arbitration Act (FAA) makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[12] Enacted in response to the hostility toward arbitration agreements, the FAA mandates that courts "place arbitration contracts on 'equal footing with all other contracts.'"[13] However, the FAA's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'"[14]

In 2013, in *D.R. Horton, Inc. v. NLRB*,[15] the Fifth Circuit rejected the NLRB's contention that class action waivers in arbitration agreements violate the NLRA and held such provisions permissible. The court began its analysis in that case by explaining that the use of class or collective action is a procedural rather than a substantive right.[16] Then, because the waiver provision appeared in an arbitration agreement, the court turned to the application of the FAA. With respect to the relevancy and applicability of the FAA, the court concluded that because Section 7 did not create a substantive right, the NLRA and the FAA did not conflict, permitting the enforceability of the waiver provision. The court acknowledged that a contrary congressional command could have been "an inherent conflict between the FAA and the NLRA's purpose," but observed that it did "not find such a conflict."[17] The court thus concluded: "The issue here is narrow: do the rights of collective action embodied in th[e NLRA] make it distinguishable from cases which hold that arbitration must be individual arbitration? We have explained the general reasoning that indicates the answer is no."[18] The court's determination was consistent with that of all of the other circuits at that time.[19]

The Fifth Circuit upheld its position in 2015 in *Murphy Oil USA, Inc. v. NLRB*.[20] In *Murphy*, the NLRB argued that Murphy Oil USA, Inc., the operator of various gas stations throughout the United States, violated the NLRA by seeking to enforce an impermissible contract provision—namely,

11. 29 U.S.C. § 158(a)(1).
12. 9 U.S.C. § 2.
13. DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 468 (2015) (citation omitted).
14. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (citation omitted).
15. 737 F.3d 344 (5th Cir. 2013).
16. *See id.* at 357–58.
17. *Id.* at 361.
18. *Id.* at 362. Internal quotation marks and citation omitted.
19. *Id.* ("Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable.").
20. 808 F.3d 1013 (5th Cir. 2015).

a clause in an arbitration agreement with employees providing that employees agreed to resolve all employment-related disputes through individual arbitration. In rejecting the NLRB's posture, the Fifth Circuit reiterated that it is not an unfair labor practice to require employees to submit to individual arbitration.[21]

In May 2016, in *Lewis v. Epic Systems Corp.*, the Seventh Circuit, however, took the contrary view and created a split among the circuit courts.[22] In *Lewis*, the court held that class action waivers in employment arbitration agreements violate the NLRA, reasoning that commencing suit in a class or collective action is precisely the type of "concerted activity" that Section 7 protects. The court recognized that "the circuits have some differences of opinion in this area," but concluded that "those differences d[id] not affect [its] analysis."[23] Moreover, the court disagreed with the Fifth Circuit's analysis that the NLRA and the FAA could be in conflict with each another, noting that any argument that the FAA trumped the NLRA "puts the cart before the horse."[24] The court explained: "Before we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all. In order for there to be a conflict between the NLRA as we have interpreted it and the FAA, the FAA would have to mandate the enforcement of [the] arbitration clause. As we . . . explain, it does not."[25] The court therefore concluded that, rather than conflict, the statutes "work hand in glove," since provisions requiring employees to waive class or collective action are "illegal" and thus "meet[] the criteria of the FAA's saving clause for nonenforcement."[26]

In November 2016, the Ninth Circuit took the same view as the Seventh Circuit in *Morris v. Ernst & Young, LLP*.[27] In that case, the Ninth Circuit reasoned that prohibiting employees from bringing classwide employment-related claims rendered the rights afforded by the NLRA meaningless.

On January 13, 2017, the U.S. Supreme Court granted certiorari in *Murphy*, *Lewis*, and *Morris* and consolidated the cases for oral argument.

B. *Tackling the Issue Within and Despite the Circuit Split*

While the question of whether an employer violates the NLRA by requiring employees to resolve employment-related disputes through individual

21. In 2016, the Second Circuit took the same view as the Fifth Circuit in *Patterson v. Raymours Furniture*, 659 F. App'x 40 (2d Cir. 2016). The Eighth Circuit thereafter agreed with the Fifth and Second Circuits in *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016).
22. 823 F.3d 1147 (7th Cir. 2016).
23. *Id.* at 1155.
24. *Id.* at 1156.
25. *Id.*
26. *Id.* at 1157.
27. 834 F.3d 975 (9th Cir. 2016).

arbitration awaits Supreme Court resolution, federal and state courts are tasked with continuing to address the issue. During the survey period, the courts remained split on the question.

1. U.S. Courts of Appeal

From November 2016 to April 2017, the Fifth Circuit, in a series of unpublished opinions, continued to reject the NLRB's argument that class action waivers in arbitration agreements violate the NLRA.[28] In its most-recent decision, *Acuity Specialty Products v. NLRB*, the Fifth Circuit noted that the NLRB's unwavering position that class action waivers are invalid "directly contravenes [its] decisions in" *Horton* and *Murphy*.[29] In *Acuity*, the relevant arbitration agreement required employees to "waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial."[30]

Contrary to the holdings in the Fifth Circuit, in May 2017, the Sixth Circuit, addressing the issue for the first time in *NLRB v. Alternative Entertainment, Inc.*, held that provisions waiving class or collective action in arbitration agreements are invalid under both the NLRA and the FAA.[31] The pertinent employment documents at issue provided that employees agreed to resolve employment-related disputes "exclusively through binding arbitration" and that no claim could be "arbitrated as a class action, also called 'representative' or 'collective' actions, and that a claim may not otherwise be consolidated or joined with the claims of others."[32] Siding with the NLRB and the Seventh and Ninth Circuits, the Sixth Circuit held:

> [W]e disagree with the Fifth's Circuit's holding that employers may require employees to agree to a mandatory arbitration provision requiring individual arbitration of employment-related claims. Mandatory arbitration provisions that permit only individual arbitration of employment-related claims are illegal pursuant to the NLRA and unenforceable pursuant to the FAA's saving clause.[33]

28. *See* Jack in the Box, Inc. v. NLRB, 671 F. App'x 316 (5th Cir. 2016); Citigroup Tech., Inc. v. NLRB, 671 F. App'x 286 (5th Cir. 2016); Emp'rs Res. v. NLRB, 670 F. App'x 271 (5th Cir. 2017); Dismuke v. McClinton, 670 F. App'x 210 (5th Cir. 2016); Citi Trends, Inc. v. NLRB, 668 F. App'x 78 (5th Cir. 2016).

29. 686 F. App'x 298, 298 (5th Cir. 2017).

30. *Id.* The Fifth Circuit has extended its reasoning outside of the arbitration context and has held that class action waivers are generally enforceable. In August 2017, in *Convergys Corp. v. National Labor Relations Board*, 866 F.3d 635, 638 (5th Cir. 2017), the Fifth Circuit rejected the NLRB's contention that *Horton* is limited to the arbitration context, explaining: "Because our decision in *Horton* was based on our interpretation of Section 7 and our reasoning was not limited to interpretation and application of the FAA, the Board's argument that *Horton* is limited to the arbitration context is unpersuasive." The Fifth Circuit affirmed this determination in *LogistiCare Solutions, Inc. v. National Labor Relations Board*, 866 F.3d 715 (5th Cir. 2017).

31. 858 F.3d 393 (6th Cir. 2017).

32. *Id.* at 397.

33. *Id.* at 405.

The Sixth Circuit first reasoned that, contrary to the Fifth Circuit's conclusion, the NLRA and the FAA are not in conflict such that they may be read in harmony. Specifically, the court explained:

> The NLRA prohibits mandatory arbitration provisions barring collective action or class action suits because they interfere with an employees' right to engage in concerted activity, not because they mandate arbitration. . . . According to the FAA's saving clause, because any contract that attempts to undermine employees' right to engage in concerted legal activity is unenforceable, an arbitration provision that attempts to eliminate employees' right to engage in concerted legal activity is unenforceable.[34]

To reach this holding, the Sixth Circuit presumably agreed that engaging in class or collective action is a concerted activity within NLRA Section 7.

Next, the Sixth Circuit determined that the right to engage in concerted activity is a substantive rather than procedural right, deviating from the Fifth Circuit's rationale in *Horton*. Specifically, pointing to the NLRA's "structure," the Sixth Circuit reasoned that the right to act in concert is the "only" substantive provision contained within Section 7.[35] The court explained that while Section 7 establishes the rights of employees, "every other provision of the statute serves to enforce the rights Section 7 protects."[36]

Finally, the Sixth Circuit held that "[a]t the very least, the NLRB's determination that the right to concerted legal activity is substantive, is entitled to *Chevron* deference."[37] The court explained that the NLRB is tasked with the administration of the NLRA, that the NLRB is entitled to deference in its administration, and that the NLRA is not ambiguous and has a discernable intent, precluding the application of any exception to the deference to be afforded.[38]

Judge Jeffrey S. Sutton dissented in part and concurred in part, finding that the majority incorrectly determined the legality of the class action waiver at issue. Specifically, Judge Sutton reasoned that "the NLRA does not make a general exception to the FAA for arbitration agreements or class action-waivers" and "does not specifically nullify such arbitration agreements through Section 7."[39] Judge Sutton thus concluded: "As a matter of text, and context, the right to engage in 'other concerted activities' is the right of workers to support each other in collective bargaining

34. *Id.* at 403.
35. *Id.*
36. *Id.* Alterations, internal quotation marks, and citations omitted.
37. *Id.* at 404 (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).
38. *Id.*
39. *Id.* at 412.

and even in litigation, but not the right to file a representative class action or to invoke any other collective procedure."[40]

The Seventh Circuit, revisiting the issue for a second time in November 2016, declined to overrule *Lewis*. In *Riederer v. United Healthcare Services*, the court rejected a challenge to *Lewis* based on newly enacted rules of the court and noted that its reconsideration of *Lewis* would not alleviate the conflict among the circuits.[41] The court thus concluded that the U.S. Supreme Court "is the right forum for" resolving the issue.[42]

Finally, the Ninth Circuit, in *Varela v. Lamps Plus, Inc.*, affirmed a district court ruling that permitted class action arbitration of claims involving the data breach of personal identifying information of employees.[43] Although in *Varela*, the pertinent arbitration agreement was silent on the issue of class proceedings and there was no issue of waiver, the Ninth Circuit's determination is nonetheless significant. In affirming the district court, the Ninth Circuit permitted the class action arbitration of employment-related claims, which is consistent with its finding that class action waivers are unenforceable under the NLRA. However, in reaching this conclusion, the court held that the ability to commence a class action is a procedural rather than substantive right.[44] Curiously, this was the same rationale used by the Fifth Circuit in *Horton* to conclude that class actions waivers do not contravene the NLRA.

2. U.S. District Courts

The U.S. District Courts have similarly been grappling with the issue of the enforceability of class action waivers in light of the irreconcilable conflict among the U.S. Courts of Appeal. Recently, the U.S. District Court for the Western District of New York declined to opine on the issue and deferred entering judgment on whether such provisions are enforceable in *Spano v. V & J National Enterprises, LLC*.[45] In *Spano*, the court noted that, although the Second Circuit had determined that class action waivers are valid and enforceable, and it was obligated to follow that precedent, the better course to follow was to stay the action and await the U.S. Supreme Court's decision as to the enforceability of class action waivers. District

40. *Id.*
41. *See* 670 F. App'x 419 (7th Cir. 2016).
42. *Id.* at 420.
43. *See* 2017 U.S. App. LEXIS 14284, at *4–5 (9th Cir. Aug. 3, 2017).
44. *Id.* at *5.
45. *See* No. 16-CV-06419-EAW-MWP, 2017 WL 3738555, at *13–15 (W.D.N.Y. Aug. 30, 2017).

courts in California[46] and Nevada[47] have followed suit and have stayed actions pending the Supreme Court's determination in *Murphy*, *Lewis*, and *Morris*.

In contrast, the U.S. District Court for the Northern District of Illinois, in *Hudgins v. Total Quality Logistics, LLC*, "applie[d] the law of [its] circuit in determining whether the arbitration agreements" at issue were enforceable and, consistent with the Seventh Circuit, held that such a "waiver violates the rights of employees to pursue collective action under section 7 of the NLRA and is therefore unenforceable."[48] The court thus severed "the class action waiver from the arbitration agreements and [found the remainder] of the agreements . . . enforceable."[49]

3. State Courts

In the period of time analyzed, state courts have been generally silent on the issue of the validity of class action waivers in arbitration agreements in the employment realm. Recently, however, the New York Appellate Division, the state's intermediate appellate court, found such clauses unenforceable.[50] This determination is at odds with that of the Second Circuit.

In *Gold v. New York Life Insurance Co.*, the Appellate Division agreed with the Sixth, Seventh, and Ninth Circuits that provisions requiring arbitration of any work-related claim on an individual basis are antithetical to the NLRA. As relevant here, the agreement at issue provided that any claims or disputes with New York Life Insurance Company, the employer, had to be arbitrated and that the employee waived any right to a jury trial and understood that no claims could be brought on a class or collective or representative action. The court, in holding such clauses invalid, held that it "agreed with the reasoning in *Lewis*" and "disagree[d] with the Fifth Circuit's reasoning." The court noted that there was "no reason [for] the FAA['s] policy favoring arbitration [to] trump the NLRA policy prohibiting employers from preventing collective action by employees," and that the Fifth Circuit's holding in *Horton* contained a contradiction in that the court found, on the one hand, that classwide arbitration "creates a scheme inconsistent with the FAA" and determined, on the other hand, that there was no conflict between the NLRA and the FAA.[51]

46. *See* Cook v. Rent-A-Center, Inc., No. 2:17-cv-00048-MCE-EFB, 2017 WL 4270203, at *3–4 (E.D. Cal. Sept. 26, 2017).

47. *See* Earl v. Briad Rest. Grp, LLC, No. 2:16-cv-02217-GMN-PAL, 2017 WL 3401271, at *2 (D. Nev. Aug. 8, 2017).

48. *See* No. 16 C 7331, 2017 WL 514191, at *2–3 (N.D. Ill. Feb. 8, 2017).

49. *Id.*

50. *See* Gold v. New York Life Ins. Co., 2017 N.Y. App. Div. LEXIS 5627, 2017 N.Y. Slip. Op. 05695 (N.Y. App. Div. 2017).

51. *Id.* at 322.

The Appellate Division's determination in *Gold* is at odds with the Second Circuit's holding in *Patterson v. Raymours Furniture*.[52] The court in *Patterson*, following existing precedent, declined to adopt the NLRB's posture and restated that waivers of class actions in arbitration agreements do not violate the NLRA.[53] However, the Second Circuit indicated that if it "were writing on a clean slate," it could be "persuaded . . . to hold that the . . . waiver of collective action is unenforceable."[54]

Outside of New York, the California Court of Appeal, in *Cortez v. Doty Brothers Equipment Co.*, has been one of the few state tribunals to address the issue.[55] In *Cortez*, the California intermediate court recognized the split among the circuits in their position on the enforceability of class action waivers but nevertheless declined to defer its ruling on whether the agreement at issue violated the NLRA. The court, following existing precedent, held that California has rejected the argument that class action waivers infringe on the NLRA's protection of concerted activity and held that the NLRA's protection of such activities permits parties to collective bargaining agreements to waive classwide arbitration.

C. *The Uncertain Future*

It is evident that federal and state courts attempt to provide resolution and clarity to the issue of the enforceability of class action waivers in arbitration agreements in the employee-employer context. However, any attempts may ultimately be futile in light of the pending determination from the U.S. Supreme Court. Whether waivers of classwide arbitration in the employment context are directly opposed to the NLRA's protections remains to be seen; however, a resolution is in sight. In the interim, employers should be aware of the interests and risks involved when utilizing such waivers.

II. NLRA PROTECTIONS FOR SPEECH AND WORKPLACE CONDUCT

Federal appellate opinions continued to consider the boundaries of NLRA protections for speech and workplace conduct. Recent noteworthy issues include the protected status of derogatory speech and the validity of workplace "no recording" policies.

52. 659 F. App'x 40, 43 (2d Cir. 2016).
53. *Id.*
54. *Id.*
55. *See* 222 Cal. Rptr. 3d 649 (Cal. Ct. App. 2017).

A. *Limits on Protection of Derogatory Speech*

The *en banc* Eighth Circuit considered whether the NLRA protected a union-organizing poster that questioned the safety of an employer's product.[56] The poster targeted MikLin Enterprises, an owner of Jimmy John's sandwich shop franchises in the Minneapolis area.[57]

A union sought to organize MikLin employees by promoting its effort with a campaign for paid sick leave. MikLin did not provide paid sick leave and instead required sick employees to find their own replacements or face termination.[58]

At the campaign's heart was a poster with identical pictures of a Jimmy John's sandwich. A healthy worker supposedly made one sandwich, and a sick worker supposedly made the other. The poster asked, "Can't tell the difference? That's too bad because Jimmy John's workers don't get paid sick days. Shoot, we can't even call in sick." Then the poster warned: "We hope your immune system is ready because you're about to take the sandwich test."[59]

Union supporters first put the posters on community bulletin boards in MikLin stores, but managers quickly removed the posters. Union supporters also distributed the posters to the local media. Shortly after those initial efforts, MikLin modified its sick-leave policy to impose a disciplinary-point system based on whether the employee provided notice of an absence and found a replacement.[60]

This failed to satisfy union supporters, who followed through on a threat to hang the poster in public places throughout the area. MikLin fired six employees who coordinated the effort.[61] Divided NLRB and Eighth Circuit panels upheld an administrative law judge's conclusion that the firings were in retaliation for speech protected under the Act.[62] But the Eighth Circuit granted *en banc* reconsideration.

By an eight-to-two vote, the full Eighth Circuit concluded that the posters were not protected speech and that the firings were not unlawful.[63] The majority considered the interplay between the Act's Section 7, which protects concerted employee activity, and Section 10(c), which prevents compelled reinstatement of individuals who were suspended or discharged for cause.[64] In the majority's view, the Supreme Court's opinion

56. MikLin Enters., Inc. v. NLRB, 861 F.3d 812 (8th Cir. 2016).
57. *Id.* at 815–16.
58. *Id.*
59. *Id.*
60. *Id.* at 815–17.
61. *Id.* at 817.
62. MikLin Enters., Inc., 361 N.L.R.B. No. 27 (2014); MikLin Enters., Inc. v. NLRB, 818 F.3d 397 (8th Cir. 2016).
63. *MikLin*, 861 F.3d at 818–26.
64. *Id.* at 818–19 (citing 29 U.S.C. §§ 157, 160(c)).

in *NLRB v. Local Union No. 1229, IBEW* (*Jefferson Standard*) reconciled those provisions by allowing termination for speech that shows disloyalty to the employer.[65] The majority considered the posters to be similar to the conduct in *Jefferson Standard*: "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."[66]

"When employees convince customers not to patronize an employer because its labor practices are unfair, subsequent settlement of the labor dispute brings the customers back, to the benefit of both employer and employee," the majority explained.[67] "By contrast, sharply disparaging the employer's product or services as unsafe, unhealthy, or of shoddy quality causes harm that outlasts the labor dispute, to the detriment of all employees as well as the employer."[68] A food-industry business, the majority opined, is "dependent on its 'clean' public image," which the posters attacked with an "image of contaminated sandwiches" that would not "easily dissipate."[69]

The majority rejected the Board's interpretation of *Jefferson Standard*.[70] The Board had drawn a line between communications, like those in *Jefferson Standard*, that merely related to or coexisted with a labor dispute and communications that directly attack an employer's labor practice. Under the Board's rule, communications in the first category can lose protection due to disloyalty, but only a malicious motive would cause communications in the second category to lose protection.[71]

The dissent opined that *Jefferson Standard* did not set out a test to balance employee and employer interests, thereby leaving the Board discretion to formulate its own test. The dissent found the Board's test reasonable because the rule protected cogent arguments for seeking the public's assistance, including the argument that MikLin's policies encouraged food-handling employees to work while sick.[72]

The recent Second Circuit opinion in *NLRB v. Pier Sixty, LLC* underscores that context is a significant concern in disparaging speech cases.[73] During a break, a catering company's disgruntled employee posted the following Facebook message, which referred to his supervisor and a

65. *Id.* at 819 (citing NLRB v. Local Union No. 1229, IBEW (*Jefferson Standard*), 346 U.S. 464 (1953)).
66. *Jefferson Standard*, 346 U.S. at 471 (quoted and discussed in *MikLin*, 861 F.3d at 819).
67. *MikLin*, 861 F.3d at 822.
68. *Id.*
69. *Id.* at 825.
70. *Id.* at 821.
71. *Id.; see also id.* at 832 (Kelly, J., dissenting).
72. *Id.* at 830–31, 837 (Kelly, J., dissenting).
73. NLRB v. Pier Sixty, LLC, 855 F.3d 115 (2d Cir. 2017).

union representation election: "Bob is such a NASTY MOTHER F-ER don't know how to talk to people!!!!! F[-] his mother and his entire f[-]ing family!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!"[74]

The employer fired the employee for the post. But the employer had tolerated similar profanity, including by supervisors, in the workplace. The post occurred in the midst of a heated unionizing effort, and the employer admitted to threatening workers with job and benefit losses if they supported the union.[75]

The Second Circuit observed that "even an employee engaged in ostensibly protected activity may act 'in such an abusive manner that he loses the protection' of the NLRA."[76] But the court also noted a disagreement about the proper framework for identifying "abusive" behavior.[77] Historically, the Board had used a four-factor test that looked to the place, subject matter, nature, and provocation.[78] With the growth of social media, the Board adopted a nine-factor "totality of the circumstances" test for social media cases.[79] The Second Circuit criticized the nine-factor test as "amorphous," providing insufficient weight to employer interests and subject to case-by-case manipulation.[80] The court nonetheless avoided deciding the test's propriety because the employer challenged the Board's conclusion but not the test itself.[81]

The Second Circuit agreed with the Board that the speech was protected. The subject matter—complaints of a supervisor's disrespectful treatment of employees and support for unionization—weighed in favor of protection. So, too, did the "context of daily obscenities" without discipline. The location—a personal Facebook page—also favored protection because the speech was neither in the immediate presence of customers nor disruptive to the work.[82] The Second Circuit warned, however, that the Facebook post "seems to us to sit at the outer-bounds of protected, union-related comments."[83]

74. *Id.* at 118.
75. *Id.* at 118, 124–25.
76. *Id.* at 122 (quoting NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 837 (1984)).
77. *Pier Sixty*, 855 F.3d at 122–23.
78. *Id.* (citing Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979)).
79. *Id.* at 123. The nine factors are: "(1) any evidence of antiunion hostility; (2) whether the conduct was provoked; (3) whether the conduct was impulsive or deliberate; (4) the location of the conduct; (5) the subject matter of the conduct; (6) the nature of the content; (7) whether the employer considered similar content to be offensive; (8) whether the employer maintained a specific rule prohibiting the content at issue; and (9) whether the discipline imposed was typical for similar violations or proportionate to the offense." *Id.*
80. *Id.*
81. *Id.* at 123–24.
82. *Id.* at 124–25.
83. *Id.* at 125.

The *MikLin* and *Pier Sixty* opinions show the difficulties in defining appropriate boundaries for the protection of disparaging speech under labor statutes. While civility should be encouraged, the nature of many current public debates may result in more cases where employees push and cross boundaries.

B. *Two Circuit Opinions Target Overly Broad Rules on Recordings in the Workplace*

The Second Circuit and the Fifth Circuit each considered the application of the NLRA to policies against recordings in the workplace. The Second Circuit examined Whole Foods' policy, and the Fifth Circuit examined T-Mobile's policy.[84] In both instances, the courts concluded that the policies were too broad and violated the Act.[85]

The Second Circuit agreed with the NLRB that overly broad no-recording policies prevent employees from "recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules."[86] The Fifth Circuit likewise agreed that "a reasonable employee, generally aware of employee rights, would interpret [an overly broad policy] to discourage protected concerted activity, such as even an off-duty employee photographing a wage schedule posted on a corporate bulletin board."[87]

Both circuits rejected the employers' attempts to justify the prohibitions with legitimate business interests because the language of their policies provided no basis for exempting conduct that the Act protects.[88] As the Second Circuit observed, the employers could accommodate their business interests "simply by their narrowing the policies' scope."[89]

These circuit opinions provide additional examples of the difficulties facing employers in drafting workplace rules. The rules should be broad enough to cover legitimate interests in employee privacy and proprietary information, but should also remain narrow enough to exclude protected activity. And while these two opinions stand closer to the frontier of the Act's jurisprudence, some employers continue to invite trouble with poli-

84. Whole Foods Mkt. Grp., Inc. v. NLRB, 691 F. App'x 49 (2d Cir. 2017); T-Mobile USA, Inc. v. NLRB, 865 F.3d 265 (5th Cir. 2017).
85. *Whole Foods*, 691 F. App'x at 51; *T-Mobile*, 865 F.3d at 274–75.
86. *Whole Foods*, 691 F. App'x at 51.
87. *T-Mobile*, 865 F.3d at 274.
88. *Whole Foods*, 691 F. App'x at 51; *T-Mobile*, 865 F.3d at 274–75.
89. *Whole Foods*, 691 F. App'x at 51 n.1.

cies that violate well-established principles under the Act—such as policies that prohibit employees from sharing salary information.[90]

III. RECENT DEVELOPMENTS IN SEXUAL ORIENTATION DISCRIMINATION

A. *Introduction*

Sexual orientation discrimination has been a changing area of the law and the subject of much disagreement, not only among some circuit courts, but also between federal agencies; the U.S. Equal Employment Opportunity Commission (EEOC) and U.S. Department of Justice (DOJ) hold opposing views on the issue. Title VII of the Civil Rights Act of 1964 does not explicitly prohibit discrimination on the basis of sexual orientation. It specifically prohibits discrimination on the basis of race, color, religion, sex, or national origin.[91] Sexual orientation, transgender status, gender expression, and gender identity are not specifically identified in Title VII.[92]

In 2015, the U.S. Supreme Court in *Obergfell v. Hodges* held that same-sex couples have a fundamental right to marry, and any state laws that excluded same-sex couples from civil marriage were invalid.[93] The Court also found that there was no lawful basis to refuse to recognize same-sex marriage on the ground of its same-sex character.[94]

To date, however, although various state and local statutes and ordinances have addressed these areas as protected classes, Congress has not amended Title VII to include sexual orientation, gender identity, or transgender status discrimination as a category for which discrimination is prohibited. Although Congress has not specifically done so, with the differences of opinions between executive agencies and the circuit courts, it is expected that the U.S. Supreme Court will reach a decision on this contested issue in the next couple of years.

B. *Federal Courts Discussing Sexual Orientation Discrimination*

The U.S. Supreme Court has not directly ruled on whether sexual orientation is protected under Title VII. Many courts have held that sexual ori-

90. NLRB v. Long Island Ass'n for AIDS Care, 870 F.3d 82 (2d Cir. 2017) (unlawful termination of employee for refusing to sign overly broad confidentiality policy); NLRB v. Long Island Ass'n for AIDS Care, 696 F. App'x 556 (2d Cir. 2017) (confidentiality policy expressly prohibiting employee conversations about salaries violated the Act).

91. 42 U.S.C. § 2000e-2(a).

92. It is significant to note that these areas are included as protected classes in various state and local statutes and ordinances.

93. 135 S. Ct. 2584, 2604–05 (2015).

94. *Id.* at 2608.

entation discrimination is not actionable under Title VII.[95] However, the Supreme Court has issued several opinions that are relevant to whether Title VII may cover sexual orientation discrimination.

In *Price Waterhouse v. Hopkins*, the Court held that the practice of gender stereotyping is a form of protected sex discrimination under Title VII.[96] The Court reasoned that the "because of sex" language in the statute, provided that in all but when gender is a "bona fide occupational qualification," Title VII prohibits employers from making gender even an indirect stumbling block to employment opportunities.[97]

Thereafter, in 1998, in *Oncale v. Sundowner Offshore Services*, the Supreme Court clarified that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim.[98] The Court ruled that Title VII's prohibition of discrimination because of sex protects men as well as women.[99] The Court held that the harassing conduct need not be motivated by sexual desire to support an inference of employment discrimination on the basis of sex.[100]

In essence, the U.S. Supreme Court has acknowledged that it is difficult "to extricate the gender nonconformity claims from the sexual orientation claims."[101] Sex stereotyping claims and gender non-conformity claims have been found to fall under Title VII, but the courts are in disagreement on whether sexual orientation is covered or considered part "gender non-conformity" or "sex stereotyping." And, as such, differing opinions have been issued.

95. *See* Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000) ("[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII."); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063–64 (9th Cir. 2002) ("[A]n employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action."); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006) (Sexual orientation is not a prohibited basis for discriminatory acts under Title VII.); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir.1999) (Title VII does not prohibit harassment based on sexual orientation.); Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) (concluding that sexual orientation discrimination is not cognizable under Title VII); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (Title VII does not preclude sexual orientation discrimination.).

96. 490 U.S. 228 (1989).

97. *Id.*

98. 523 U.S. 75, 79 (1998).

99. *Id.* at 78.

100. *Id.* at 80.

101. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 342 (7th Cir. 2017); *see also* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

In 2000, in *Simonton v. Runyon*, the Second Circuit affirmed the district court's ruling holding that Title VII of the Civil Rights Act of 1964 does not prohibit harassment or discrimination because of sexual orientation.[102] However, in 2017, the U.S. District Court for the Eastern District of New York granted summary judgment to Altitude Express on Donald Zarda's Title VII claim, finding no evidence that his termination was connected to his failure to conform to a masculine stereotype.[103] At the same time, the district court found sufficient evidence of sexual orientation discrimination to allow Zarda's state law sexual orientation discrimination claim to go forward. Zarda requested reconsideration of the denial of the Title VII claim based on *Baldwin v. Foxx*,[104] an EEOC administrative decision holding that sexual orientation discrimination violates Title VII. The district court denied the motion, concluding it was bound by *Simonton*,[105] which held that Title VII does not prohibit discrimination based on sexual orientation.

Thereafter, the Second Circuit affirmed the summary judgment and determined that the former employee could receive a new trial only if the prohibition on sex discrimination under Title VII of the Civil Rights Act of 1964 encompassed discrimination based on sexual orientation, a result foreclosed by case law. The Second Circuit also found that Zarda failed to establish the requisite proximity between his termination and his failure to conform to gender stereotypes, and he did not challenge that determination on appeal.[106]

Thereafter, the Second Circuit determined that the appeal would be reheard with an *en banc* panel that would review the decision and make a determination on the following issue: "Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination because of sex?"[107] The rehearing *en banc* was granted on May 25, 2017. In the rehearing appeal, the EEOC and the DOJ, as well as others, filed amicus briefs.[108] In its amicus brief, the DOJ encouraged the Second Circuit to disregard the position of the EEOC that Title VII protects sexual orientation discrimination.[109]

102. 232 F.3d 33 (2d Cir. 2000).
103. *See* Zarda v. Altitude Express, 855 F.3d 76 (2d Cir. 2017).
104. EEOC Decision No. 0120133080 (July 16, 2015).
105. Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000).
106. *Zarda*, 855 F.3d at 82.
107. Zarda v. Altitude Express, 2017 U.S. App. Lexis 13127 (2d Cir. 2017); *Simonton*, 232 F.3d at 36 (holding that Title VII does not prohibit discrimination based on sexual orientation).
108. Brief for the United States as Amicus Curiae, No. 15-3755 (July 26, 2017); Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants in Favor of Reversal, No. 15-3755 (June 23, 2017).
109. Brief for the United States as Amicus Curiae, No. 15-3775 (July 26, 2017).

The EEOC, on the other hand, filed its amicus brief, encouraging the Second Circuit to hold that sexual orientation discrimination is covered under Title VII because it (1) involves impermissible sex-based considerations, (2) constitutes gender-based associational discrimination, and (3) relies on sex stereotyping.[110]

On March 10, 2017, the Eleventh Circuit addressed this issue in *Evans v. Georgia Regional Hospital* and held that discrimination based on sexual orientation was not covered under Title VII.[111] The court reasoned that although discrimination based on gender non-conformity was actionable, the employee's *pro se* complaint failed to plead facts sufficient to create such a claim.[112] In addition, a claim for sexual orientation per se was not covered under Title VII.[113] The Eleventh Circuit found that it was bound by its precedent in *Blum v. Gulf Oil Corp.*,[114] where the Fifth Circuit held that "discharge for homosexuality is not prohibited by Title VII."[115]

In contrast with *Evans*, in April 2017, the Seventh Circuit *en banc* held in *Hively v. Ivy Tech Community College of Indiana* that sex includes transgender status/gender identity status and sexual orientation.[116] The Seventh Circuit is the first appellate circuit court in the nation to hold that Title VII protects against sexual orientation discrimination.

In reaching its decision to rehear the case *en banc*, the Seventh Circuit specifically noted the first panel's statement that there was an ongoing "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."[117] The Seventh Circuit held that sexual orientation discrimination is unlawful under Title VII and explained that "[a]ny discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner is a reason purely and simply based on sex."[118] The Seventh Circuit noted the underlying panel's highlight of "the sharp tension between a rule that fails to recognize that discrimination on the basis of sex with whom a person associates is a form of sex discrimination, and the rule, recognized since *Loving v. Virginia*, that discrimination on the basis of race with whom a person associates is a form of racial discrimination."[119]

110. Brief for the United States as Amicus Curiae, No. 15-3775 (June 23, 2017).
111. 850 F.3d 1248, 1255 (11th Cir. 2017).
112. *Id.*
113. *Id.*
114. 597 F.2d 936 (5th Cir. 1979).
115. *Id.* at 938.
116. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).
117. *Id.*
118. *Id.* at 347.
119. *Id.* at 342 (citing Loving v. Virginia, 388 U.S. 1 (1967)).

Finally, on November 16, 2017, in the U.S. District Court for the Western District of Pennsylvania, the EEOC prevailed in its action against Scott Medical Health Center when the court determined that a former gay employee was subjected to harassment and discriminatory treatment based on his sexual orientation in violation of Title VII. Scott Medical Health Center was ordered to pay $55,000 in back pay, compensatory damages, and punitive damages to its former employee, Dale Massaro.[120] The court held that Title VII's "because of sex" provision prohibits discrimination on the basis of sexual orientation.[121]

C. *Contradicting Positions of Federal Agencies*

1. The EEOC

The EEOC is the primary agency charged by Congress with interpreting and enforcing Title VII of the Civil Rights Act of 1964.[122] In this regard, the EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation.[123] Under the EEOC's interpretation, these protections apply regardless of any contrary state or local laws.[124]

The EEOC has issued examples of LGBT-related claims that it views as sex discrimination, which include: (1) failing to hire an applicant because she is a transgender woman; (2) firing an employee because he is planning or has made a gender transition; (3) denying an employee equal access to a common restroom corresponding to the employee's gender identity; (4) harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees; or (5) discriminating in terms, conditions, or privileges of employment, such as providing a lower salary to an employee because of sexual orientation or denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is woman.[125]

120. U.S. Equal Emp't Opportunity Comm'n v. Scott Med. Health Ctr., Case No. 2:16-CV-00225-CB (W.D. Pa. Nov. 16, 2017).

121. EEOC v. Scott Med. Health Ctr., P.C., 217 F. Supp. 3d 834, 839 (W.D. Pa. 2016).

122. 42 U.S.C. §§ 2000e et seq.

123. U.S. Equal Emp't Opportunity Comm'n, *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, *available at* https://www1.eeoc.gov//eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

124. *See id.*; *see also* U.S. Equal Emp't Opportunity Comm'n, *Preventing Employment Discrimination Against Lesbian, Gay, Bisexual or Transgender Workers*, *available at* https://www.eeoc.gov/eeoc/publications/brochure-gender_stereotyping.cfm.

125. *Id.*

Throughout the years, the EEOC has also filed lawsuits and amicus curiae briefs encouraging the protection of sexual discrimination claims based on gender identity and/or sexual orientation under Title VII.[126]

2. U.S. Department of Justice

On December 15, 2014, former U.S. Attorney General Eric Holder, on behalf of the DOJ, issued a memorandum to the United States Heads of Department Components.[127] This memorandum supported the position of the EEOC. In the Memorandum, the Attorney General asserted that the Department will no longer assert that Title VII's prohibition against discrimination based on sex does not encompass gender identity per se (including transgender discrimination). Specifically, he determined that sex-stereotyping remains an available theory under which to bring a Title VII claim, including a claim by a transgender individual, in cases where the evidence supports that theory. Therefore, he explained that sex discrimination under Title VII was not limited to biological sex discrimination and that courts had recognized that gender identity discrimination claims may be established under a sex-stereotyping theory.

However, in an about-face from the DOJ's position under U.S. Attorney Holder, on July 26, 2017, the DOJ submitted an amicus brief in a case before the Second Circuit, *Zarda v. Altitude Express, Inc.*, asserting that Title VII's prohibitions on sex discrimination do *not* include discrimination because of sexual orientation and that the law covers only discrimination between men and women.[128] The DOJ also asserted that Congress was responsible for expanding the scope of the law, not the courts.[129] Interestingly, in the amicus brief, the DOJ determined that Congress had many opportunities to amend the provisions concerning sex discrimination over the past few decades, and although it had chosen to amend the law to include pregnancy, it had not done so with regard to sexual orientation discrimination.[130]

Thereafter, on October 4, 2017, the DOJ issued a memorandum concluding that Title VII's prohibition on sex discrimination did not cover transgender employees.[131] The DOJ stated that Title VII's prohibition

126. *Id.*

127. *See* Memorandum from Eric Holder, U.S. Attorney General, to U.S. Attorneys/Heads of Department Components, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), *available at* https://www.justice.gov/file/188671/download.

128. Brief for the United States as Amicus Curiae, No. 15-3755 (July 26, 2017), in Zarda v. Altitude Express, Inc., 2017 U.S. App. Lexis 13127 (2d Cir. 2017).

129. *Id.*

130. *Id.*

131. *See* Memorandum from Jeff Sessions, U.S. Attorney General, to U.S. Attorneys/Heads of Department Components, Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017), *available*

on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se or transgender status. The DOJ explained that it was a matter of law and not an issue of policy. The DOJ reasoned that the sole issue addressed was what conduct Title VII prohibits by its terms, not what conduct should be prohibited by statute, regulation, or employer action. It further reasoned that the Department of Justice must interpret Title VII as written by Congress.[132]

As explained above, the DOJ filed an amicus brief in the *Zarda* case. It argued that the court should reaffirm its settled precedent holding, consistent with the longstanding position of the DOJ that Title VII does not reach discrimination based on sexual orientation. The DOJ also argued that the question before the court was not whether as a matter of policy sexual orientation discrimination should be prohibited. It explained that Congress and the executive branch had prohibited such discrimination in various contexts, including the prohibition of such discrimination in hate crimes, certain federal funding programs, government contracting, federal employment, and non-performance-related treatment under the Civil Service Reform Act. It argued that the sole question was whether, as a matter of law, Title VII reaches sexual orientation discrimination. And that since it did not, any efforts to amend Title VII's scope should be directed to Congress rather than the courts.

D. *What Is Expected Next*

It is not clear how the DOJ's position on the appropriate interpretation of Title VII regarding sexual orientation protections will affect the courts. It is clear that the EEOC is continuing its efforts to bring claims and assert that sexual orientation discrimination is protected under Title VII. Until there is specific action from Congress regarding the language in Title VII or a definitive decision from the U.S. Supreme Court as to whether sexual orientation is protected under Title VII, the issue will remain open for decisions supporting varying interpretations.

In the future, the Supreme Court may hear a case involving opposing rulings to resolve the disagreement in the circuits. If the issue is eventually decided by the Supreme Court, the decision will also be impacted by the justices sitting on the court at that time.

LGBT advocacy groups have asked the U.S. Supreme Court to resolve the split between circuit courts over whether Title VII of the Civil Rights Act precludes discrimination based on sexual orientation. The Second

at https://assets.documentcloud.org/documents/4067437/Sessions-memo-reversing-gender-identity-civil.pdf.

132. *Id.*

Circuit will soon issue its decision in *Zarda*, a case questioning the circuit's precedent.[133] The Eleventh Circuit has stood by its precedent, but *Evans* has filed a petition for writ of certiorari with the U.S. Supreme Court.[134]

It is expected that the two federal agencies will continue to hold opposing positions. The EEOC will continue to investigate and bring lawsuits for alleged sexual discrimination claims. It is expected that the U.S. Supreme Court will review and resolve the issue in the next couple of years. In the interim, as many state and local laws protect against sexual discrimination claims, and these claims may sometimes be encompassed within a sexual stereotyping or sexual non-conformance claim, employers should ensure that they have the proper policies and training in place to prevent sexual orientation and related claims.

IV. THE NLRB IS POISED TO BALANCE EMPLOYERS' LEGITIMATE BUSINESS INTERESTS WITH EMPLOYEES' PROTECTED RIGHTS UNDER THE NLRA

A. *Introduction*

The cases issued by the NLRB from October 2016 to October 2017 reflect the transition from the Obama-era Board, and its generally pro-labor leaning decisions applying an expansive definition of employees' Section 7 rights, to a Board composed of a Republican majority for the first time in almost a decade. Two seats remained vacant for eight months of the Trump administration. During this time, Chairman Philip Miscimarra found himself the only Republican member among the Obama-appointed members, forcing him to continue his dissenting role in a number of cases.

Finally, in the fall of 2017, President Trump made two new appointments to the Board. Marvin E. Kaplan, who served as the former chief counsel of the Occupational Safety and Health Review Commission, and the Republican counsel to the House Committee on Education and Workforce, was sworn in on August 10, 2017. William J. Emanuel, a former management-side attorney with decades of traditional labor law experience, was sworn in on September 25, 2017.[135] With the appointment of these two members, the Board finally had a Republican-appointed majority. At the end of Chairman Miscimarra's term, the Republican majority Board issued a number of decisions overturning Obama-era precedent, in-

133. 2017 U.S. App. Lexis 13127 (2d Cir. 2017).

134. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017), *petition for cert. filed* (Sept. 7, 2017) (No.17-370); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979).

135. Mr. Emanuel was previously a shareholder of Littler, Mendelson P.C.

cluding rejecting the *Browning Ferris* joint employer standard, overturning *Specialty Healthcare's* overwhelming community of interest standard, and imposing a new standard on employer rules.[136] Under the new rules standard, when considering a facially neutral rule the Board will balance: (1) the nature and extent of the potential impact on employees' protected rights; and (2) the employer's legitimate justifications associated with the rule.[137]

The new Republican majority was short lived. NLRB Chairman Miscimarra's term expired on December 16, 2017. His departure left the Board with a 2-2 Republican and Democratic split among its members. On December 22, 2017, President Trump appointed Marvin Kaplan as the Chairman of the National Labor Relations Board. In addition, on January 12, 2018, President Trump nominated John Ring, co-chair of the labor and employment practice at a management-side law firm, to fill Chairman Miscimarra's vacant seat. This nomination is subject to Senate confirmation.

The previous General Counsel, Richard Griffin, a former union attorney, was arguably one of the most controversial in recent administrations. His term expired on October 31, 2017. In addition to pursuing the demise of class action waivers, he implemented the NLRB's new ambush election rule; targeted neutral employer handbook policies; found NCAA football players to be employees under the Act; prosecuted a national restaurant franchise and its individual franchisees as joint employers; and asked the Board to modify its standards to expand protection to intermittent and partial strikes to protect new models of labor protests, such as those used by the "Fight for $15."

The Griffin era came to an end on November 8, 2017, when the Senate confirmed Peter Robb as the new General Counsel of the NLRB. Mr. Robb served as a NLRB field attorney and as chief counsel to NLRB Member Robert Hunter from 1981 to 1985. He also worked as the head of the labor and employment group of a private firm representing corporations and trade associations. The General Counsel serves an important role within the NLRB. It acts as the Board's chief prosecutor and decides whether to issue complaints on unfair labor practice charges, determines the legal theo-

136. See *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 165 (2017), which rejected *Browning-Ferris Industries of California, d/b/a BFI Newby Island Recyclery (Browning-Ferris)*, 326 NLRB No. 186 (2015), and returned to the Board's prior test for joint employers. *See also PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), which overturned *Specialty Healthcare*, 357 NLRB No. 83 (2011), to reinstate the Board's prior standard for determining the appropriateness of a petitioned-for bargaining unit.

137. *See* Boeing Co., 365 NLRB No. 154 (2017), overturning Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004).

ries applicable to each case, and provides legal advice to the regional offices regarding cases and particular issues.

As expected, on December 1, 2017, the new General Counsel issued a memorandum to its regional offices, identifying all the issues that must be sent to the General Counsel's Division of Advice before action is taken on the case.[138] The new General Counsel provided the memorandum to address the "many changes in precedent, often with vigorous dissents" faced over the last eight years.[139] Those issues include no loss of protection of the Act despite obscene, vulgar, or other highly inappropriate conduct; finding rules unlawful if they prohibit disrespectful conduct, use of employer trademarks and logos, and the use of cameras and recording; certain confidentiality rules; rules that would have different outcomes under Chairman Miscimarra's reversal of the *Lutheran Heritage*[140] standard; employee access to employer email systems for non-business use; off-duty employee access rights; conflicts with other statutory requirements; joint employer; and successorship rules. In addition, the new General Counsel specifically withdrew certain General Counsel memoranda and initiatives, including those concerning expanding *Purple Communications*[141] to other business electronic systems, asserting that misclassification of employees as independent contractors violates the Act independently, concerning partial and intermittent strikes, and addressing the legality of the employer rules under the Act. Along with the new Republican majority on the NLRB, this agenda may result in the Board continuing to adopt the approaches in many of Chairman Miscimarra's dissents in overturning the prior administration's more controversial decisions.

B. Significant Decisions by the NLRB from October 2016 to October 2017

The most significant NLRB developments from October 2016 to October 2017, and the positions advocated by Chairman Miscimarra's dissents, are discussed below.

1. Employer Handbooks

In a series of cases at the end of the Obama board's term, the Board continued its scrutiny of neutral employer rules and employer handbooks. In *Cellco Partnership d/b/a Verizon Wireless*,[142] the Board scrutinized Verizon's facially neutral handbook and found several of Verizon Wireless'

138. *See* Memorandum from Peter B. Robb, General Counsel, to All Regional Directors, Officers-in-Charge, and Resident Officers, Mandatory Submissions to Advice (18-02).
139. *Id.*
140. Lutheran Heritage Village-Livonia, 343 N.L.R.B. No. 646 (2004).
141. Purple Commc'ns, Inc., 361 N.L.R.B. No. 126 (2014).
142. 365 N.L.R.B. No. 38 (2017).

policies unlawful based on their potential to chill employees' Section 7 rights. The majority concluded that Verizon's rule requiring employees to keep employee personal information confidential, including Social Security numbers, identification numbers, passwords, financial information, and residential telephone numbers and addresses, was unlawful because employees would reasonably read this rule to prohibit them from discussing terms and conditions of employment or disclosing personal employee information. The Board rejected an argument that the rule pertained only to the disclosure of employee information acquired and retained by the employer. However, the full Board agreed that the subsequent version of the policy was lawful because it only identified personal employee information as "social security numbers, identification numbers, passwords, bank account information and medical information."

The majority also found a policy unlawful that required employees participating in outside organizations, such as a local school board, to avoid conflicts of interest. The Board concluded that employees would reasonably construe the policy to restrict participation in labor unions. The majority also applied its decision in *Purple Communications* to find Verizon's policy prohibiting the use of company systems (such as email, instant messaging, the Intranet, or Internet) to engage in activities that are unlawful, violate company policies, or result in Verizon Wireless' liability or embarrassment. The policy listed examples of inappropriate uses as "pornographic, obscene, offensive, harassing or discriminatory content; chain letters, pyramid schemes or unauthorized mass distributions; communications primarily directed to a group of employees inside the company on behalf of an outside organization." The majority found the policy unlawful, but Chairman Miscimarra dissented. He would have found the policy lawful and repeated his position from previous cases that the Board's "reasonably construe" test in *Lutheran Heritage* is contrary to Supreme Court precedent requiring the Board to "give substantial consideration to the justifications associated with the rule, rather than only considering a rule's potential adverse effect on NLRA rights."[143]

In one surprising case, *Macy's, Inc.*,[144] Republican and Democratic members joined together to find that Macy's confidentiality rule prohibiting employees from disclosing customer information did not violate the Act. While recognizing that employees generally have a Section 7 right to appeal to their employer's customers for support in a labor dispute, the majority found the rule lawful because it prohibited only the disclosure

143. Cellco P'ship d/b/a Verizon Wireless, 365 NLRB No. 38, slip op. at 5 (Miscimarra, dissenting) (citing Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797–98 (1945)); Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004)).

144. 365 NLRB No. 116 (2017).

of information about customers obtained from the respondent's confidential records specifically defined as customers' Social Security numbers, credit card numbers, customer names, and contact information. Member Pearce dissented, finding that the rules broadly barring disclosure of customer information could reasonably be construed as chilling employees' Section 7 rights.

Although the Obama-era Board rarely considered evidence of the employer's neutral intent in adopting workplace rules, the Board recently recognized that an employer has the right to present evidence of its legitimate business justifications. In *Mercedes-Benz U.S. International Inc.*, the Board denied a motion for summary judgment by the NLRB's General Counsel in a case involving the employer's maintenance of an employee handbook rule prohibiting the use of cameras and video recording devices without prior approval.[145] The Board found that Mercedes-Benz may present evidence in the underlying case establishing that the rule "furthers legitimate business interests, including the protection of proprietary and confidential information, the maintenance of safety and production standards, and open communication" by employees, that the rule is not per se unlawful under the Act because employees at the plant did not understand the camera rule to restrict Section 7 activity under the NLRA, and that its business interests outweigh any Section 7 employee rights.[146] Although the majority made it clear that it was not making a decision regarding the merits of the case, it rejected Member Pearce's dissent, which urged the Board to find the rule unlawful on its face.

2. Social Media

In *Butler Medical Transport, LLC*, a disgruntled former employee posted on Facebook that he believed his termination was unfair.[147] A current employee replied in a post recommending that the former employee obtain a lawyer or contact the labor board. The employee was terminated for violating the company's policy prohibiting employees from using social media to discredit or damage the company. In a separate post, another employee posted a comment laced with profanity, suggesting that his company vehicle was broken down because the company did not want to buy new equipment. The company's investigation revealed that his vehicle was not broken down that day. He was also terminated for violating the company's social media policy.

The majority affirmed the administrative law judge's finding that the employee's recommending that a former employee obtain a lawyer and

145. 365 NLRB No. 67 (2017).
146. *Id.*
147. 365 NLRB No. 112 (2017).

contact the labor board was unlawful under the Act because he was engaging in protected, concerted activity when he discussed a former employee's discharge and advised him of a potential remedy. The majority considered a legal theory not raised before the ALJ and found the company's social media policy "overly broad" because employees have a NLRA-protected right to criticize their employer on social media when those criticisms pertain to protected, concerted activity.

The full Board upheld the second employee's termination because the post was not for mutual aid and protection and his post was "maliciously false" because his vehicle did not break down on the day of the post. Chairman Miscimarra concurred with the portion of the decision finding that the second employee's conduct was unprotected. However, he would have found both employees' conduct unprotected. He disagreed with the *Continental Group*[148] and *Double Eagle*[149] line of cases invalidating *all* discipline imposed pursuant to an unlawfully broad rule, even when the discipline was obviously warranted, because it produces "absurd outcomes."

3. Employee Access Rights

A Board majority found that an employer violated the Act by denying a former employee access to its nightclub after she filed an FLSA collective action on behalf of herself and other similarly situated employees.[150] The hotel and casino had a longstanding past practice of granting access to former employees, like other members of the public, to socialize at its establishments. The majority agreed with the administrative law judge that the employer retaliated against the employee for engaging in the protected concerted activity of filing a class and collective action against the employer on matters concerning the workplace. This retaliation would chill employees' Section 7 rights. Chairman Miscimarra dissented, stating there was no right of access to employer private property for former employees. In addition, other current employees, who joined the lawsuit, were not barred from the property, so there was no impact on Section 7 rights.

4. NLRB Election Rule

The Board applied a strict interpretation of its new election rule's technical requirements, particularly against employers. The full Board found that an employer interfered with the representation election by providing a voter list that failed to substantially comply with the Board's voter list requirements.[151] The majority found three reasons for setting aside the

148. Cont'l Grp., Inc., 357 NLRB No. 409 (2011).
149. Double Eagle Hotel & Casino, 341 NLRB 112 (2004).
150. MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino, 365 NLRB No. 76 (2017).
151. RHCG Safety Corp., 365 NLRB No. 88 (2017).

election and noted that each would constitute an independent basis for setting it aside. The Board found that approximately 90 percent of the addresses on the list were inaccurate, the list omitted the names of at least fifteen eligible voters, and the employer failed to provide employee phone numbers. Chairman Miscimarra dissented in part. He agreed that the election should be set aside because most of the employee addresses were incorrect. He noted that the rule's short time lines contributed to these problems and disagreed with the voter list requirements in the current rule because they failed to accommodate employees' privacy interests.

A majority also set aside an election because the employer failed to comply with the election rule's requirement that it serve the voter list on the union within two business days after approval of the election agreement.[152] The employer won the election by a vote of ninety-one to fifty-four. The Regional Director excused the employer's failure to provide the list to the union directly because the regional office provided it to the union within two business days, effectively satisfying the requirement. However, the majority stated that allowing parties to ignore the service requirements of the rule without any explanation or excuse would undermine the purpose of those provisions. Chairman Miscimarra dissented and agreed with the Regional Director's decision that the requirement was satisfied because the union received the list within two days and that the objection elevated form over substance.

In a case that appeared directly contrary to its 2016 decision in *Brunswick Bowling Products*,[153] which allowed a union to rely on a position statement it served on the region, but failed to serve on the employer, a majority affirmed the Regional Director's decision to preclude an employer from litigating the appropriateness of a petitioned-for unit under the new election rule because it failed to timely serve a statement of position on the union.[154] In this case, the employer timely filed the statement of position with the region, but failed to serve it on the union. The majority distinguished this case from *Brunswick Bowling Products*, stating that case involved a contract-bar issue that was raised by the parties separate from the union's statement of position. Chairman Miscimarra dissented on this issue, generally disagreeing with the position statement and preclusion requirements under the new election rules.

Finally, highlighting how quickly elections may occur under the new rule, a majority denied an employer's request for expedited review of a Regional Director's decision scheduling an election only three days after the parties entered an election agreement.[155] The Regional Director

152. URS Fed. Servs. Inc., 365 NLRB No. 1 (2016).

153. Brunswick Bowling Prods., LLC, 364 NLRB No. 96 (2016).

154. Williams-Sonoma Direct, Inc., 365 NLRB No. 13 (2017) (citing *Brunswick Bowling*, 364 NLRB No. 96).

155. European Imports, Inc., 365 NLRB No. 41 (2017).

set an election date giving only three days' notice to nine of fifty-two employees in a stipulated unit that they would be eligible to vote in the election. The majority stated expedited review was unnecessary because the employer could file an objection challenging the Regional Director's decision after the election. Chairman Miscimarra dissented, stating his belief that the short time frame unduly prejudices the parties and extinguishes the employees' right to have a reasonable period of time to become familiar with election issues. This abbreviated time frame also curtailed the right of all parties to engage in protected speech.

5. Election Conduct

The Board majority found that the employer violated the Act by soliciting employee grievances and impliedly promising to remedy them. During a visit to the facility, the company's CEO asked an employee "how things were going" and that he would "follow up and look into" her concerns.[156] Contrary to the ALJ, the majority found, under the *Maple Grove Health Care Center*[157] standard, that the CEO solicited grievances, impliedly promised to remedy them, and failed to rebut the inference of illegality. The Board's *Maple Grove Health Care Center* decision states that absent a previous practice, the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances, violates the Act. Chairman Miscimarra dissented and agreed with the ALJ's conclusion that the employer did not solicit grievances and impliedly promise to remedy them by asking an employee how things were going and replying that he would look into her concerns after she complained.

6. Definition of Employee

The Board also continued its expansion of the statutory definition of who is an employee under the Act. In *Minnesota Timberwolves Basketball, LP*, a Board majority found, contrary to the Regional Director, that crew members producing electronic content displayed on a four-sided video display board during professional basketball games are employees covered under Section 2(3) of the Act.[158] Under the *FedEx Home Delivery*[159] standard, the majority found that the employer exercised more than "scant" or "sporadic" control over the individuals' work, had the right to issue in-

156. Mek Arden, LLC, 365 NLRB No. 109 (2017).
157. Maple Grove Health Care Ctr., 330 NLRB 775 (2000).
158. 365 NLRB No. 124 (2017).
159. Fedex Home Delivery, 361 NLRB No. 55 (N.L.R.B. Sept. 30, 2014), *review granted, enforcement denied and order vacated sub nom.* FedEx Home Delivery v. Nat'l Labor Relations Bd., 849 F.3d 1123 (D.C. Cir. 2017), and *review granted, enforcement denied and order vacated sub nom.* FedEx Home Delivery v. Nat'l Labor Relations Bd., 849 F.3d 1123 (D.C. Cir. 2017).

game assignments to crew members, and provided almost all of the necessary production equipment and furnishings in the control room. In addition, the Board noted that crew members worked for the employer for many years, and broadcasting the video is an essential component of the employer's business. These factors all weighed heavily in favor of employee status. The majority found that the record did not show that crew members operated as part of independent businesses or with actual entrepreneurial opportunity within the meaning of *FedEx*. Chairman Miscimarra dissented and would have found the crew members independent contractors in light of common law agency principles because they possessed distinct skills, were paid on a per-game basis, were free to take other work, and Timberwolves Basketball does not control the details of their work or supervise them.

7. Successor Employers

In *Allways East Transportation, Inc.*, a majority found a small employer, which took over part of a transportation contract, was a successor employer and violated the Act by failing and refusing to recognize and bargain with the union and failing to respond to the union's information request.[160] The majority noted that the essence of successorship does not require an identical re-creation of the predecessor's customers and business. Instead, it only requires the new employer's conscious decision to maintain generally the same business and to hire a majority of its predecessor's employees. Relying upon *Fall River Dyeing*,[161] the majority found substantial continuity of operations because the successor performed the same general business service of providing school bus transportation for the special education students, and the employees performed the same general jobs of transporting special education students to and from schools by school bus on a predetermined route. The majority rejected the "minor differences" in operations, which included a new facility, different supervisors, fueling procedures, and handbook policies, as sufficient to preclude successorship.

Chairman Miscimarra dissented, citing the lack of a substantial community of interest from the perspective of employees. The predecessor, Durham, provided both general and special education services. The new company focused only on providing special education services, did not take over any of its predecessor's operations, and instituted completely new policies and procedures. Given these facts, Chairman Miscimarra asserted that

160. 365 NLRB No. 71 (2017).

161. Fall River Dyeing Corp., 272 NLRB 839 (1984), *order enforced sub nom.* N.L.R.B. v. Fall River Dyeing & Finishing Corp., 775 F.2d 425 (1st Cir. 1985), *aff'd*, 482 U.S. 27 (1987).

the ALJ properly found that the new business was substantially dissimilar from the operations of its predecessor.

8. Jurisdiction

The Board continued its expansion of its jurisdiction in the area of religious colleges and universities. In *Saint Xavier University*, a majority held that the Board has jurisdiction over non-teaching housekeeping employees at religious colleges and universities.[162] The majority concluded that it should assert jurisdiction over the non-teaching employees of religious institutions, or non-profit religious organizations, unless their actual duties and responsibilities require them to perform a specific role in fulfilling the religious mission of the institution.

The majority rejected the university's arguments that its status as a religious institution exempted it from the Act's jurisdiction and that exerting jurisdiction created a conflict between the Religion Clauses of the First Amendment. The majority found the Board's position in *Catholic Bishop*[163] was limited to religious school teachers who play a "critical and unique role" in creating and sustaining the religious environment. The petitioned-for employees are non-teaching employees who did not play a similar role in carrying out the religious message of the institution, so the exercise of the Board's jurisdiction would not create "serious constitutional questions."

Acting Chairman Miscimarra dissented. He believed that the Board lacks jurisdiction over any nonteaching employees at religiously affiliated schools. In fact, he asserted that the very process of inquiring into whether particular subjects, practices, or institutions were sufficiently "secular" to permit the Board to exercise jurisdiction was enough to interfere with the religious mission of the school. He advocated adopting a bright line rule that exempts institutions from the Board's jurisdiction if they hold themselves out as a religiously affiliated institution.

9. Intermittent Strikes

The Board limited an employer's ability to discipline employees for participating in nationwide intermittent labor protests. The full three-member Board, including Chairman Miscimarra, found that a one-day strike against the new owner of a Kansas City Burger King restaurant did not constitute unprotected intermittent strike activity.[164] Therefore, the new owner violated the Act by disciplining six employees for participating in the strike conducted by the Fight for $15 and a Workers Organizing Committee. Approximately four months earlier, the same organization conducted a one-

162. 365 NLRB No. 54 (2017).
163. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).
164. EYM King of Mo. LLC d/b/a Burger King, 365 NLRB No. 16 (2017).

day strike against the previous restaurant owner and in other Kansas City restaurants. The employer contended that it was the ninth national strike and the seventh strike in Kansas City. Rather than viewing it as a series of nationwide strikes, the Board emphasized that the employees engaged in only one strike against this employer at the time of the discipline and all six employees engaged in protected strike activity on the same day.

C. *Conclusion*

The Board continued its activist agenda through the end of the Obama-appointed Board's majority. As the composition of the Board changes under the Trump administration in the coming year, and the new General Counsel reshapes the Board's legal agenda, employers hope to see more neutral decisions that balance legitimate business interests with the protection of employees' Section 7 rights. As always, employers continue to face an ever-changing labor law landscape that requires them to constantly adopt their policies to the changing political leanings of the Board.